UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FENG SUO ZHOU, et al.,	:	
Plaintiffs,	:	00 Civ. 6446 (WHP)
- v. -	:	
LI PENG,	:	
Defendant.	:	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States of America, by its attorney, Mary Jo White, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] and pursuant to the Court's order dated April 2, 2001.

BACKGROUND[2]

In this suit against an official of the People's Republic of China, Plaintiffs made an ex parte application and secured an order, filed under seal, providing that "service shall be accomplished by delivering a copy of the summons and complaint to any employee of the United States government or its agencies who is guarding defendant Li Peng during his stay in New York. Said employee is to forthwith provide said defendant with the said copy of the summons

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any . . . district in the United States . . . to attend to any [] interest of the United States." 28 U.S.C. § 517.

[2] The United States sets forth background facts relevant to this Statement of Interest. As a nonparty to this action, the United States is not seeking to litigate or formally contest any aspect of the factual background as set forth in Plaintiffs' "Memorandum of Law In Support of Plaintiffs' Contention that Defendant Li Peng Was Properly Served," nor as set forth in the supporting declarations and exhibits. The United States, however, does not in fact accept the truth of certain contentions, as set forth below, concerning when and whether the United States became aware of the Court's order dated August 30, 2000.

and complaint during defendant's stay in New York." Order dated August 30, 2000 (unsealed by subsequent order of the Court) (the "August 30 Order") (per Casey, J., sitting in Part I).

Having secured the then-sealed August 30 Order, early in the morning of August 31, 2000, Plaintiffs delivered a copy of the summons and complaint to Special Agent Robert Eckert, an employee of the United States Department of State's Bureau of Diplomatic Security who was assigned to Li Peng's protective detail. This delivery occurred in the garage area of the Waldorf Astoria hotel, where Li Peng was staying while in New York.

Agent Eckert, who was deposed, testified that he was not given a copy of the Court's August 30 Order, as Plaintiffs concede. Eckert Tr. 19 (copy previously submitted by Plaintiffs); Pl. Mem. 11 (referring to "fact that the order itself was not served on Special Agent Eckert"). Agent Eckert also testified that he has no recollection of being told of any such order, and that he had no understanding of the existence of any such order. Id. at 76-77. Agent Eckert further testified that he is confident that he never learned of the existence of the August 30 Order until this Office showed it to him much later, in preparation for his deposition. Id. at 49. Plaintiffs have submitted declarations indicating that at the time they delivered the summons and complaint, a process server showed the August 30 Order to Agent Eckert and permitted him to read it, but did not give a copy to Agent Eckert. See Pl. Mem. 4.

Agent Eckert signed an additional copy of the summons, which Plaintiffs' process server retained. Eckert Tr. 48. Agent Eckert then brought the summons and complaint to the State Department security detail's "command post" within the Waldorf and sought instruction from his supervisor, Special Agent in Charge Thomas Barnard. Agent Barnard, who was also deposed, testified that the summons and complaint were the only legal papers in the State

Department's possession, and that Agent Eckert told him that those were the only papers Agent Eckert received or knew of. Barnard Tr. 51. Like Agent Eckert, Agent Barnard neither saw nor learned of the August 30 Order during Li Peng's visit to New York. Id. 54-55, 61. Agent Barnard testified that he never notified Li Peng of the summons and complaint and did not give Li Peng those documents. Id. 57. Moreover, Agent Barnard was with Li Peng at all times during his visit to New York when Li Peng was in the presence of protective personnel, and Agent Barnard was unaware of any United States official ever delivering the summons and complaint to Li Peng or telling him about them. Id. 103-04.

Agent Barnard gave a "heads-up" to a "Chinese diplomat assigned to the United Nations mission here in New York" that "there were some legal papers." Barnard Tr. 66. That official was "not part of Mr. Li Peng's personal staff," id. 68, which accompanied Li Peng as part of his delegation for his visit. Agent Barnard testified that this Chinese official expressed some familiarity with the matter, id. 66, and possibly stated that the matter was already in the Hong Kong press. Id. 69.

On September 1, 2000, Assistant United States Attorney Wendy Schwartz of this Office attempted without success to determine whether there was an order relating to service of process in this matter, as had been reported in the press. See Declaration of Wendy H. Schwartz dated October 12, 2000 (previously filed with the Court) at ¶¶ 5, 7. Ms. Schwartz was unable to determine whether such an order existed. Id. ¶ 5-8. Ms. Schwartz returned the summons and complaint to Plaintiffs' counselwith an accompanying letter, which was transmitted by fax and Federal Express early in the evening of September 1. Id. ¶ 9, Ex. B.

Plaintiffs' counsel faxed copies of the Court's August 30 Order to AUSA

Schwartz in this Office at approximately 11:12 p.m. on the evening of Friday, September 1, 2000. Schwartz Decl. Ex. 11-12. Ms. Schwartz was not in the Office at the time. Id. ¶ 13. Li Peng left New York for China at approximately 11:40 or 11:45 p.m. on September 1. Schwartz Decl. ¶ 17; Barnard Tr. 87. Ms. Schwartz received a copy of the August 30 Order when she reported to work on September 5, 2000, the first business day following the Labor Day weekend spanning September 2-4, 2000. Id. ¶ 14. Ms. Schwartz is unaware of any United States official receiving a copy of the August 30 Order before she did. Id. ¶ 15. Because the United States was not apprised of the August 30 Order until after Li Peng's departure from the United States, the United States did not have occasion to consider what action to take in response the Order.

The United States has no knowledge and takes no position concerning Plaintiffs' submissions as to their efforts to serve Li Peng through a concierge at the Waldorf Astoria, or concerning their assertions relating to Li Peng's possible knowledge of this suit. See Pl. Mem. 7-9.

DISCUSSION

At issue is the proper interpretation of the Court's August 30 order, which, as the Court has noted, contains at least a potential ambiguity as to whether it contemplates that service shall be complete upon the mere delivery of the summons and complaint to United States protective personnel, or whether service was to be complete only upon the contemplated ultimate delivery of the summons and complaint to Li Peng by United States protective personnel. See Transcript of hearing dated February 2, 2001 at 8-10. If the August 30 Order is construed to require actual delivery to Li Peng by protective personnel in order to complete service as authorized by that Order, then service has not been completed as contemplated in the Order

because (as Plaintiffs at least assume arguendo, Pl. Mem. 12) there is no evidence that anyone delivered the summons and complaint to Li Peng. If, by contrast, the August 30 Order is interpreted to provide that service would be complete upon delivery of the summons and complaint to United States protective personnel, and if such service satisfies constitutional due process requirements, then – because Plaintiffs did deliver the summons and complaint to Agent Eckert – service would be complete.

Plaintiffs have conceded that they themselves drafted the order. See Feb. 2, 2001 Tr. at 9. They state that the order is "patterned" after one which they inaccurately state was "sustained" by the Second Circuit in Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995). Pl. Mem. 10-11.[3] Plaintiffs sought and obtained the August 30 Order pursuant to the alternative method of service provision applicable in New York,[4] which permits service upon natural persons "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section." Pl. Mem. 10 (quoting CPLR § 308(5)).

The August 30 Order should not be read to deem service complete upon the mere

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[3] Contrary to Plaintiffs' characterization, the Second Circuit's decision in Kadic never "sustained" the order upon which Plaintiffs "patterned" their order; rather, in Kadic United States personnel personally delivered the summons and complaint to the defendant as contemplated in a district court order, so that neither the propriety of the method of service set forth in the order nor the validity of service in the absence of actual delivery to the defendant was at issue. See 70 F.3d at 246. The defendant in Kadic did not dispute that he personally received the papers at issue. Id. Instead, he contended that he enjoyed immunity from service of process. Id. The Second Circuit rejected this contention. Id. Thus Kadic has no bearing on whether service may ever be accomplished on any defendant solely by delivery to others assigned to protect that individual, and without actual delivery to the defendant.

[4] Fed. R. Civ. P. 4(e)(1) permits service on an individual "pursuant to the law of the state in which the district court is located."

delivery of the summons and complaint to United States protective personnel. As Plaintiffs recognize, to be valid, a method of service prescribed under CPLR § 308(5) must satisfy the due process requirements that the method afford "notice reasonably calculated, under the circumstances, to apprise the parties of the pendency of the action and afford them the opportunity to present their objections." Pl. Mem. 13 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); citing Peralta v. Heights Medical Ctr., Inc., 485 U.S. 80, 84 (1988)).

An order deeming service complete upon delivery to United States protective personnel, without more, would not meet this standard for constitutionally sufficient service. United States protective personnel are not agents of the foreign officials they protect for accepting service of process on behalf of those officials or for any other purpose; Plaintiffs do not contend to the contrary, whether by operation of law, international custom, or some specific arrangement with Li Peng in this case. To the contrary, United States protective personnel are United States employees fulfilling a sensitive mission on behalf of the United States, namely, to protect visiting dignitaries who are visiting this country. See Schwartz Decl. Ex. B ("The function of the Diplomatic Security Protective Detail is to provide security and not to serve process"). As was borne out by events in this case, the likely course of events should United States protective personnel be served with process directed at a foreign official is not that such personnel would promptly and without reflection relay the papers to their "protectee." Rather, such personnel should, and do, seek guidance from appropriate persons within the United States government, and act as directed by those United States officials. Accordingly, merely providing for the delivery of papers to United States protective personnel cannot be deemed "reasonably

calculated" to provide Li Peng with notice and an opportunity to respond to the summons and complaint. Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("doctrine of constitutional doubt" generally holds that "'every reasonable construction [of a statute] must be resorted to, in order to save [it] from unconstitutionality'") (quoting Hooper v. California, 155 U.S. 648, 657 (1895)); United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

Plaintiffs' recitation of a variety of cases upholding means of service that may not have resulted in actual notice to a defendant, see Pl. Mem. 13-15, is unavailing. Unsurprisingly, none of the cases cited is analogous to this one. The mere fact that corporations can be served through the New York Secretary of State as a statutorily-authorized agent of process has no bearing on this case, nor does the fact that individuals who have demonstrated that they are actively trying to evade service may at times be held adequately served even in the absence of actual personal delivery.

Moreover, the form order prepared by Plaintiffs' counsel departed from the order obtained in Kadic subtly, yet significantly, so that Plaintiffs' counsel created whatever degree of ambiguity lies within the August 30 Order. Whereas the August 30 Order contained two separate sentences, the first of which provided that service was to be accomplished by delivering the summons and complaint to United States protective personnel, and the second of which directed such personnel to "provide" the papers to Li Peng "during his stay in New York," see August 30 order; Pl. Mem. 11, the comparable provision in Kadic consisted of one sentence which provided

that service would be complete when plaintiffs delivered the summons and complaint to protective personnel, "and said employee is to forthwith serve said defendant" with the summons and complaint. Pl. Mem. 11; Goodman Decl. Ex. 2. Particularly where Plaintiffs caused this ambiguity either through their own drafting decisions or through inadvertence, they should not be perceived as unwitting victims of an ambiguous order, nor should they be permitted to take advantage of an ambiguity which they themselves created, and which would have the extraordinary effect of deeming protective personnel agents for a foreign government official for purposes of accepting service of process on his or her behalf. Indeed, on the facts here, Plaintiffs urge this remarkable result without having provided a copy of the August 30 Order to these Government personnel, which would have afforded the United States an opportunity to learn the contents of the Order and to determine an appropriate course of action.[5]

In addition, deeming protective personnel agents for service of process on foreign government officials would place extraordinary strains on the United States' already-difficult task of protecting visiting foreign dignitaries, and would significantly harm the United States' conduct of foreign relations. The accomplishment of the protective mission depends on the willingness of foreign dignitaries to permit United States protective personnel to have close access to them, and further depends on protective personnel enjoying the complete trust and cooperation of their protectees. Should the Court adopt procedures whereby any litigant seeking to sue a foreign official could accomplish service merely by serving papers on United States

[5] The United States is also concerned about the effect an order directing United States protective personnel to serve process upon a foreign government official would have on our ability to protect visiting dignitaries and on foreign relations in general. However, we need not address these concerns here as the validity of the court's Order directing such service is not at issue in this case.

protective personnel, there is a serious risk that foreign dignitaries will stop permitting those personnel to operate near them, and will stop cooperating with them.

Moreover, and critically, adoption of such a construction would cause major strain in our nation's relations with foreign states. Any instances (which have not become numerous) where litigants seek orders authorizing service on United States protective personnel as agents of foreign officials exacerbate the foreign relations difficulties inherent in such suits. Precedent deeming service complete upon delivery to United States protective personnel would have the harmful effect of precluding the United States, in appropriate cases, from seeking to quash any ex parte orders seeking to compel service, including in certain cases on individuals who may enjoy immunity from the Court's jurisdiction, and from service of process. The judiciary should exercise great care not to impair the Executive Branch's conduct of foreign relations by adopting Plaintiffs' construction here, which would have the effect of making protective detail personnel agents for service of process with no opportunity for the United States to know of the contents of the order, or to object to it.

CONCLUSION

For the reasons stated above, the Court's August 30 Order should be construed to authorize service only by both the delivery of the summons and complaint to United States protective personnel, and the subsequent delivery of the summons and complaint by such personnel to defendant Li Peng. No United States personnel delivered the summons and complaint to Li Peng. Accordingly, Plaintiffs' August 31 delivery of the summons and

complaint to Special Agent Eckert failed to effectuate service as contemplated by the August 30 Order.

Dated: New York, New York
June 1, 2001

Respectfully submitted,

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